Office-Supreme Court, U.S.
FILED
OCT 14 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2199

IN THE UNITED STATES SUPREME COURT OCTOBER TERM 1981

NAPOLEON JAMES,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER*
BARBARA J. LIPSCOMB
Assistant Attorneys General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent
**Counsel of Record*

QUESTIONS PRESENTED

I. WHETHER THE STOP OF PETITIONER WAS LAWFUL UNDER *TERRY V. OHIO*, 392 U.S. 1 (1968), AND ITS PROGENY.

II. WHETHER THE SEIZURE OF INCRIMINATING EVIDENCE WAS IN "PLAIN VIEW", SO AS TO EXEMPT IT FROM THE WARRANT REQUIREMENT.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATMENT OF CASE 2

REASONS WHY THE WRIT SHOULD BE DENIED 2

I. THE TEXAS COURT OF APPEALS' HOLDING THAT THE INVESTIGATIVE STOP OF PETITIONER WAS LAWFUL UNDER *TERRY V. OHIO*, 392 U.S. 1 (1968), DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT 2

II. THE STATE COURT'S DETERMINATION THAT THE EVIDENCE SEIZED WAS WITHIN THE "PLAIN VIEW" DOCTRINE DOES NOT RAISE A QUESTION WORTHY OF THIS COURT'S REVIEW 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases	Page
Armstrong v. State, 550 S.W. 2d (Tex. Crim. App. 1976)	4
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	6
Galitz v. State, 617 S.W. 2d 949 Tex. Crim. App. 1981)	5
Harris v. United States, 390 U.S. 234 (1968)	6
Hull v. State, 613 S.W. 2d 735, (Tex. Crim. App. 1981)	4,5
Terry v. Ohio, 392 U.S. 1 (1968)	3
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	*passim*
United States v. Cortez, 449 U.S. 411 (1981)	*passim*
Williams v. State, 621 S.W. 2d (Tex. Crim. App. 1981)	5

CONSTITUTIONS, STATUTES, AND RULES

28 U.S.C. §1257(3)	2
U.S. Constitution Amendment IV	2

NO. 81-2199

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1981

NAPOLEON JAMES,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW THE STATE OF TEXAS, Respondent herein, by and through her attorney, the Attorney General of Texas, and respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Texas Court of Criminal Appeals in this case.

OPINION BELOW

The opinion of the Texas Court of Appeals and notification of the denial of discretionary review by the Texas Court of Criminal Appeals are attached to the Petition for Writ of Certiorari as Appendix.

JURISDICTIONAL STATEMENT

Petitioner was convicted by a county court in Dallas County, Texas, of misdemeanor possession of marijuana. That conviction was affirmed by the Texas Court of Appeals, Fifth Supreme Judicial District, in No. 05-81-00134-CR on December 10, 1981. The Texas Court of Criminal Appeals denied discretionary review on March 24, 1982. This Court has jurisdiction to review the judgment by certiorari pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV

The right of the people to be secure in their persons houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE

The statement of facts set out in the Petition, pages 2-3, is substantially correct.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE TEXAS COURT OF APPEALS' HOLDING THAT THE INVESTIGATIVE STOP OF PETITIONER WAS LAWFUL UNDER *TERRY V. OHIO*, 392 U.S. 1 (1968), DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

The fourth amendment to the United States Constitution, applicable to the States through the fourteenth amendment, generally requires law enforcement officials

to obtain a warrant, issued upon a showing of probable cause, before conducting a search. Since *Terry v. Ohio*, 392 U.S. 1 (1968), however, this Court has recognized that under some circumstances, law enforcement officers may detain an individual without arresting him and conduct a limited search of that person or the area without a warrant, and without probable cause. Whether a warrant is required in a given case depends on several factors, including the length of the detention, and the degree of intrusion into the subject's privacy.

The most recent pronouncements by this Court of the doctrine announced in *Terry v. Ohio* have been in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), and *United Sttes v. Cortez*, 449 U.S. 411 (1981). The guiding standard for a investigatory stop, short of arrest based on probable cause, is the presence of a reasonable suspicion that the subject is engaging in criminal activity. *Brignoni-Ponce, supra.* An officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. *Cortez, supra.* The legality of the stop is to be evaluated in light of all the circumstances.

Petitioner complains that the Texas Court of Appeals erred by not analyzing the facts of his case in accordance with *United States v. Cortez.* He does not specify exactly in what way the court's analysis is deficient. Nevertheless, it is clear that the court correctly applied the "investigative detention" doctrine as it has developed since *Terry v. Ohio. Brignoni-Ponce* mandates that the detaining officer must have knowledge of specific, articulable facts which, in light of his knowledge and experience, lead to a reasonable suspicion that the detainee is connected with the suspected criminal activity. Here, the officer was patrolling what he knew to be a high-crime area, particularly susceptible to burglaries and criminal mischief. He heard the sound of breaking glass nearby and observed Petitioner, who appeared to be ner-

vous, walking rapidly away from the vicinity of the sound. He then observed Petitioner driving away from the scene at a high rate of speed. No one else was in the area. The police officer, who had several years' experience, thus articulated the specific facts and inferences which led to his decision to stop Petitioner for a brief conversation. The Court of Appeals, applying these facts to the *Brignoni-Ponce* doctrine, determined that the officer's suspicion was reasonable, and that the initial stop was lawful under the constitution.

It is true that *Cortez* is not cited in the opinion of the court of appeals, but that circumstances alone does not constitute a conflict with the *Cortez* holding. *Cortez* does not limit the doctrine of Brignoni-Ponce; rather, it reaffirms the constitutionality of a detention short of arrest under these circumstances. The only modification of *Brignoni-Ponce* in *Cortez* is this Court's explicit recognition that facts and observations which appear meaningless to an untrained person may be sufficient to justify a detention when evaluated in light of special training and experience. Nothing in *Cortez* suggests that the initial stop here was unlawful.

Petitioner makes much of the requirement in *Cortez* that the officer's suspicion be "particularized" as to the connection between the detainee and some criminal activity, and dicta in a Texas case to the effect that the suspected criminal activity must likewise be particularized. *Hull v. State*, 613 S.W. 2d 735, 739 n.10 (Tex. Crim. App. 1981). Again, it is not clear in what way Petitioner considers these concepts to have been misapplied in his case. The Texas courts have consistently required that an investigative stop must be justified by reasonable suspicion of a particular person, and have held that random checks do not meet the *Brignoni-Ponce* standard. *Hull v. State, supra; Armstrong v. State*, 550 S.W. 2d (Tex. Crim. App. 1976).

Here, the officer's testimony indicates that his suspicion was centered on Petitioner; there was no one else in the area. To the extent that the footnote in *Hull* imposes a more stringent standard for "particularized suspicion" than the fourth amendment does, it is a matter of state law. In any case, that requirement too appears to have been met. The officer suspected that Petitioner had been involved in burglary or criminal mischief at a specified time and location. The fact that he was later charged with a different crime does not change the character of the initial stop.

Petitioner does not allege that the Texas courts consistently refuse to abide by this Court's decisions in the area of investigative detentions. Clearly, Texas has followed *Brignoni-Ponce* and *Cortez*. *See, e.g., Williams v. State*, 621 S.W.2d (Tex. Crim. App. 1981); *Galitz v. State*, 617 S.W.2d 949 (Tex. Crim. App. 1981); *Hull, supra*. He apparently complains only that the reviewing court in his case applied the law incorrectly. Whether true or not, it does not raise an issue of constitutional dimensions; this Court does not sit to correct individual injustices. The writ should be denied.

II. THE STATE COURT'S DETERMINATION THAT THE EVIDENCE SEIZED WAS WITHIN THE "PLAIN VIEW" DOCTRINE DOES NOT RAISE A QUESTION WORTHY OF THIS COURT'S REVIEW.

After Petitioner was lawfully stopped, the officer saw him lean forward and drop his shoulder, as if he were placing something on the floorboard of the car. Concerned for his safety, the officer called for cover and only after another officer arrived did he walk back to the side of the car and look in. Petitioner concedes that the marijuana seized was in plain view from the officer's vantage point at the side of the car. Hence, it was not necessary to enter the car, look under the seats or in the glove compartment, or open any containers in the car.

It has long been settled that observation of items in plain view does not constitute a search within the meaning of the fourth amendment, and seizure of such items does not require a warrant or probable cause. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Harris v. United States*, 390 U.S. 234 (1968). Petitioner asserts, however, that the officer's decision to walk back around the car after Petitioner was out of the car transformed the observation into a search, so as to trigger the fourth amendment protections. According to his theory, the officer's intentional act violated the requirement in *Coolidge, supra*, that discovery of evidence in plain view be inadvertant. This requirement, however, was met when the officer properly stopped Petitioner on reasonable suspicion. At that point, he had the requisite justification for being near the car and in a position to observe whatever was in plain view.

The cases cited in the Petition to the effect that Petitioner's furtive gestures were not sufficient to justify a search of the automobile are not relevant here. This case does not involve a search, but merely a non-intrusive observation of evidence which would have been observable by any passer-by. The state court concluded that the officer's actions were reasonable and proper under all the circumstances. This determination does not indicate a conflict with current fourth amendment law, nor does it raise a new and undecided issue. It is merely an application of current law to the facts of a particular case, which is insufficient to justify this Court's exercise of jurisdiction.

CONCLUSION

Petitioner's claim represents nothing more than his dissatisfaction with the state court's decision. Since it does not raise a substantial constitutional question, this Court should decline to review it.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER*
Assistant Attorney General

BARBARA J. LIPSCOMB
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Respondent
**Counsel of Record*